

## Totaland Law

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### The death knell for urban development?

When local authorities are preparing development plans and considering planning applications they are required to have regard to Planning Policy Statement 3: Housing (PPS3).

On 9 June 2010 Greg Clark, Minister for State, Department for Communities and Local Government, announced that with immediate effect the first stage in the coalition Government's commitment to decentralise planning, namely the amendment of PPS3 to give local authorities freedom to prevent what has become known as "garden grabbing" and the overdevelopment of neighbourhoods.

The Government has excluded private residential gardens from the definition of previously developed land in annex B of PPS3. In addition, the national indicative minimum density of 30 dwellings per hectare has been deleted from paragraph 47.

The Government's stated objective is to preserve "green spaces" in urban environments and to give local authorities flexibility to set density ranges which suit local needs.

Whilst the changes to paragraph 47 are to be welcomed, particularly if this leads to the building of a greater number of family homes rather than the proliferation of apartments which satisfied the minimum densities previously imposed, one has to question the wisdom of the changes to annex B.

In times of considerable shortfall in required new housing numbers, and given the scarcity of other "brownfield" land in many South-eastern towns and cities it is likely that this change will merely make development land scarcer and more expensive, which will only serve to exacerbate housing shortages and drive up house prices. With corresponding constraints on rural development and pressure to preserve the Green Belt one has to wonder where land for the much needed housing supply will be found. It will be interesting to see how this change is implemented by local planning authorities over the next few months in determining planning applications. Feedback from readers would be much appreciated.

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#### From the Editor

Welcome to the June edition of Totaland Law, Thomson Snell & Passmore's newsletter highlighting some key issues and topical news affecting those involved in property and land-based organisations.

If you would like further advice on any of the issues covered please contact Sarah Easton.

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Recreational rights do not override the landowner's rights but if the landowner has plans for future development he or she will need to take active steps.

### Developers beware!

Local people have the right to apply for registration of a new green if they have used the land as of right for lawful sports and pastimes for over twenty years. If successful there will be a legal right to use the land for those purposes which will prohibit building on the green even with planning permission.

A recent case held that even where local people used the land alongside the landowner by keeping off the golf course when play was in progress the land could still be registered as a village green.

Recreational rights do not override the landowner's

rights but if the landowner has plans for future development he or she will need to take active steps to keep local people off the land completely.

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## Welcome news for landlords with forgotten rent reviews

A recent court case held that even a 13 year delay in exercising a rent review was not enough to prevent the landlord from triggering a review in the absence of any other factors.

This case stands as a welcome tonic to landlords who will be reviewing their portfolios and a warning note to tenants.

### The rent review clause

A lease was due for a rent review in March 1994. No review had been triggered when the tenant took an assignment of the lease in October 2005. The landlord started the rent review process in late 2006 and after referring the matter to arbitration obtained an award in August 2007 for an uplift in rent between the period March 1994 to September 2007 and increased rent with effect from 29 September 2007. The tenant took no part in the arbitration process. The landlord sought to forfeit the lease as a result of non payment of both the uplift and the revised rent.

### Issues for the tenant

The tenant sought to argue that it was too late for the landlord to trigger the rent review process as the landlord had abandoned its right to review the rent due to the delay. As a preliminary point, the court decided that because the tenant had not raised the argument during the arbitration, he could not raise it at court. However, the court took the opportunity to confirm that the wording of the rent review clause did not make time of the essence and that mere delay on its own cannot result in the

landlord losing his rights to implement the rent review.

### Practical advice

This case stands as a welcome tonic to landlords who will be reviewing their portfolios and a warning note to tenants. Concerned tenants may consider making time of the essence for the purposes of rent review by serving notice on landlords where appropriate rather than risking further delay. Potential assignees should ask for evidence of the outcome of rent reviews that should have been completed before the date of the assignment and ensure that appropriate safeguards appear in the sale contract.

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## CRC Energy Efficiency Scheme made simple

The CRC Energy Efficiency Scheme (CRC) came into force on 1 April 2010 with the consequent impact on businesses.

**A business has to provide reports setting out both projected and actual emissions, buy and sell allowances and receive recycling payments annually.**

The CRC is a mandatory 'cap and trade' emissions trading scheme, affecting both the public and private sector and even charities.

There are complicated tests to apply in deciding whether or not the CRC applies to your business. The Environment Agency (EA), who administer the scheme, sent out packs last year to many businesses who they consider might qualify.

Businesses initially included in the CRC will have an administrative burden placed upon them. A business will have to provide information on the energy it has used in 2008. Did your business keep those records?

A business that has to participate in the CRC will have to register online at [www.environment-agency.gov.uk/business/topics/pollution/11597.aspx](http://www.environment-agency.gov.uk/business/topics/pollution/11597.aspx). The registration period is between 1 April and 30 September 2010. Once a business has submitted an application for registration, it has to go through a 'validation' process which takes a minimum of two weeks. The registration deadline includes that 'validation' time.

Once in the CRC, the obligations continue. A business has to provide reports setting out both projected and actual emissions, buy and sell allowances and receive recycling payments annually. All of these obligations are for the most part an ongoing annual burden.

Even if the CRC does not initially apply to your business, there are many businesses which will still have to provide information to the EA. Whilst there is no cost involved in sending this information to the EA, there is still an intrinsic cost to a business in providing all the relevant information.

The Government has obligations to meet targets for reducing greenhouse gas emissions. Although your business may not be initially caught by the CRC it may be forced to become a participant in the future.

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### Property and the CRC Energy Efficiency Scheme

**Buildings are responsible for around 50% of the UK's total carbon dioxide emissions and if you are a property owner or occupier you are likely to be affected by the CRC Energy Efficiency Scheme in some way.**

If your business is in the CRC Energy Efficiency Scheme (CRC) and you have an investment portfolio you will need to consider whether you will be able to recover the net cost of participating in the CRC from your tenants. Do your existing leases allow you to do this? Probably not. Will you be able to negotiate new terms with tenants on renewal? Possibly. What about new tenants? A tenant in a strong negotiating position may not accept it. How will you decide how much each tenant should contribute? Will you pass back recycling payments to tenants?

If your business is not in the CRC but your landlord is, you may have to contribute to the landlord's CRC costs. Your existing lease probably will not allow your landlord to recover costs, but if your landlord wants to make changes to the lease to permit recovery you could use it as an opportunity to make favourable changes to your user obligations or restrictions on alterations. You should check your service charge bills carefully as they may increase with your landlord attempting to improve the energy efficiency of the building. If you wish to sell your property you will no doubt be asked to supply information on CRC issues and energy consumption data. If you are considering purchasing a new property you will need information so that you can check if there will be any CRC implications for you. The purchase of a property could push you into a position where you will be covered by the CRC.

In the current market many tenants are deciding to exercise their break options but with landlords keen to avoid empty properties it is vital for a tenant to get it right. Our top tip list will guide you.

## Top ten tips for breaking a lease

**1 Check terms.** All conditions attached to the break option must be met in order to successfully end the lease.

**2 Notice.** You must give the correct period of notice. One day too short and you will not be able to end the lease.

**3 Break date.** You must ensure you have calculated the break date correctly. Hopefully your lease will specify an actual date but it may refer to an anniversary of the start of the term.

**4 Method of service.** Check the lease to make sure you serve the notice by the correct method. Email is unlikely to be valid. You should keep a record of when you serve the notice and it is sensible to ask the landlord to acknowledge receipt.

**5 Comply with lease covenants.** If required, you must ensure that you have complied with all the obligations in the lease both when you serve the notice and on the break date. Strict compliance is necessary. If you are required to decorate the property in the last year of the term you must decorate even if you only decorated last year.

**6 Vacant possession.** No rubbish should be left and you must not be occupying the property on the break date.

**7 Payment of rent and other sums.** You need to ensure that you pay all sums required. This may include insurance and service charge payments as well as rent.

**8 Ask a surveyor.** If the lease is full repairing and requires reinstatement of alterations this must be dealt with and you should ask a surveyor to advise you of the work that needs to be done.

**9 Ask the landlord.** Although the landlord is under no obligation to help you, it is worth asking what works need to be carried out and what payments you need to make to avoid any uncertainty.

**10 Seek legal advice.** With so many risks it is important for you to be properly advised.

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## Guarantees. Enforceable or not?

A recent decision in the High Court on the liability of a guarantor is causing concern for landlords. Good Harvest Partnership LLP v Centaur Services Ltd has given landlords concern regarding the extent to which a guarantor can be obliged to guarantee the continuing obligations of an outgoing tenant who enters into an authorised guarantee agreement (known as an AGA) to guarantee the performance of the lease covenants by the new tenant.

The decision in the case turned on very specific facts. As a pre-condition to consent to assign the tenant's guarantor was required to enter directly into an AGA with the landlord in addition to an AGA given by the outgoing tenant. The additional AGA given by the guarantor was held to be unenforceable as the guarantor's obligations were not limited in time. Usual commercial practice is that the guarantor covenants in the lease itself to guarantee all obligations of the tenant including those under an AGA. It is believed that this is still effective but although the judge considered the point he did not make a decision. An appeal date of 29 June 2010 has been set. Watch this space for further information.

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